# 88-569

Supreme Court, U.S.
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NO. 87-1631

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

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DR. JACQULYN DIGGS,

Petitioner

v.

HARRIS HOSPITAL-METHODIST, INC.,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

I. Whether the application of 42 U.S.C. §2000e, et seq., extends beyond the traditional employer-employee relationship and prohibits discrimination by anyone having control over one's access to a job market.

II. If a traditional "employment" relationship is required to establish standing of a plaintiff under 42 U.S.C. §2000e, et seq., what test should be applied as a standard for determining whether or not an employment relationship exists, to-wit: economic realities, common law control, or a combination of both.

III. Whether plaintiff below met her burden to establish standing to assert a claim for relief under 42 U.S.C. §2000e, et seq.

INDEX


| | Page |
|---|---|
| TABLE OF CASES. . . . . | iii |
| OPINIONS BELOW. . . . . | 1 |
| JURISDICTION. . . . . | 2 |
| QUESTIONS PRESENTED . . . . . | 3 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. . . . . | 3 |
| STATEMENT OF THE CASE . . . . . | 4 |
| A. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW. . . . . | 5 |
| B. STATEMENT OF THE EVIDENCE . . . . . | 7 |
| REASONS FOR GRANTING WRIT . . . | 22 |
| I. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT PLAINTIFF DOES NOT HAVE STANDING TO ASSERT A TITLE VII ACTION AGAINST DEFENDANT HOSPITAL FOR THE REASON THAT: (1) THE COURT OF APPEALS ERRONEOUSLY DISTINGUISHED BETWEEN A TRADITIONAL "EMPLOYMENT" RELATIONSHIP BETWEEN THE PLAINTIFF AND DEFENDANT OR THIRD PARTY AS CONTRASTED WITH AN "INDEPENDENT CONTRACTOR" RELATIONSHIP; (2) | |

Page

THE COURT OF APPEALS APPLIED AN OVERLY RESTRICTIVE TEST IN DETERMINING WHETHER OR NOT PLAINTIFF HAS STANDING UNDER TITLE VII; AND (3) THE COURT OF APPEALS ERRED IN HOLDING THAT THE PLAINTIFF FAILED TO PRODUCE EVIDENCE ESTABLISHING STANDING TO ASSERT A CLAIM FOR RELIEF UNDER TITLE VII . . 22

CONCLUSION . . . . . 52

CERTIFICATE OF SERVICE . . . . 52

TABLE OF CASES


| | Page |
|---|---|
| Bartels v. Birmingham, 332 U.S. 126 (1947) . . . . . | 33, 34 |
| Doe, Ex Rel v. St. Joseph's Hospital, 788 F.2d 411 (7th Cir. 1986) . . . . . | 24, 27, 50 |
| Gomez v. Alexian Brothers Hospital of San Jose, 698 F.2d 1019 (9th Cir. 1983) . . . . . | 24 |
| Hickey v. Arkla Industries, Inc., 699 F.2d 748 (5th Cir. 1983) . . . . . | 35 |
| Hishon v. King & Spalding, 467 U.S. 69, (1984) . . . . . | 29 |
| Lutcher v. Musicians Union Local 47, 633 F.2d 880 (9th Cir. 1980) . . . . . | 34, 35 |
| Mitchell v. Frank R. Howard Memorial Hospital, No. 87-1913, 87-2069 (9th Cir., August 9, 1988, slip opinion) . . . . . | 25, 27 31, 35 |
| N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944) . . . . . | 33 |

Page

Pao v. Holy Redeemer Hospital, 547 F.Supp. 484 (E.D. Penn. - 1982) . . . . . 24

Pardazi v. Cullman Medical Center, 838 F.2d 1155 (11th Cir. 1988) . . . . . 25

Puntolillo v. New Hampshire Racing Commission, 375 F.Supp. 1089 (D.N.H. - 1974) . . . . . 24

Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) . . 32

Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1970) . . . . 24

Smith v. Dutra Trucking Company, 410 F.Supp. 513 (N.D. Cal. 1976). . . . . 34-35

Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979) . . . . . 31

United States v. Silk, 331 U.S. 704 (1947) . . . . . 32, 33

Walling v. Rutherford Food Corp., 156 F.2d 513, 516-517 (10th Cir. 1946) . . . . . 32

Wheeler v. Hurdman, 825 F.2d 257 (10th Cir. 1987), cert. den., 108 S.Ct. 503 (1987) . . . . . 31, 35

Page

Zaklama v. Mt. Sinai Medical Center, 842 F.2d 291 (11th Cir. 1988) . . . . . 25

STATUTES

28 U.S.C. §1254(1). . . . . 2

42 U.S.C. §2000e . . . . . 3, 5, 6, 7, 23, 25

42 U.S.C. §2000e-2 . . . . . 23

42 U.S.C. §2000e-2(a)(1) . . . 23

42 U.S.C. §2000(e)(f). . . . . 25

TREATISES

118 Congress Record 1463-64, 1647 . . . . . 27, 28, 29

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

NO. 87-1631

DR. JACQULYN DIGGS, Petitioner

v.

HARRIS HOSPITAL-METHODIST, INC.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Dr. Jacqulyn Diggs, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on June 21, 1988.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, whose

judgment is herein sought to be reviewed, is unreported and is reprinted in the separate Appendix to this petition, page 1. The Memorandum Opinion and Judgment of the United States District Court for the Northern District of Texas, Fort Worth Division, are also reprinted in the Appendix, pages 21 and 20, respectively.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 21, 1988. A petition for rehearing was not filed. A copy of the Court's Judgment of June 21, 1988, is reprinted in the Appendix to this petition, page 1. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1). Also, the judgment of the Court of Appeals for the Fifth Circuit conflicts with judgments of other Circuit Courts which have addressed substantially the same questions set forth below.

## QUESTIONS PRESENTED

I. Whether the application of 42 U.S.C. §2000e, et seq., extends beyond the traditional employer-employee relationship and prohibits discrimination by anyone having control over one's access to a job market.

II. If a traditional "employment" relationship is required to establish standing of a plaintiff under 42 U.S.C. §2000e, et seq., what test should be applied as a standard for determining whether or not an employment relationship exists, to-wit: economic realities, common law control, or a combination of both.

III. Whether plaintiff below met her burden to establish standing to assert a claim for relief under 42 U.S.C. §2000e, et seq.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. §2000e, et seq., which provides as follows: "It

shall be an unlawful employment practice for an employer . . . to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, sex, . . ." and "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because he has opposed any practice made in an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title."

STATEMENT OF THE CASE

This is a civil rights action brought by Dr. Jacqulyn Diggs, whose medical staff privileges were permanently suspended by the defendant private hospital. Dr. Diggs

brought her original complaint in Civil Action No. CA4-85-557-E, in the United States District Court for the Northern District of Texas, Fort Worth Division, on August 21, 1985. The complaint alleged that defendant, in terminating her medical staff privileges, had discriminated against her in violation of 42 U.S.C. §2000e, et seq. More specifically, plaintiff alleged that defendant discriminated on the basis of her race, sex, and/or in retaliation of a prior charge of discrimination that had been filed by her.

A. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

Trial was to the court on January 26, 1987. The court signed its Memorandum Opinion on the 20th day of July, 1987, and entered judgment on the same date. Judgment denied all relief sought by plaintiff.

Plaintiff timely perfected an appeal from the trial court's judgment to the United States Court of Appeals for the Fifth Circuit. The court of appeals affirmed the trial court's judgment holding that: (1) in order to having standing to assert a claim under 42 U.S.C. §2000e, plaintiff was required to establish that a traditional "employment" relationship existed between her and the defendant or some third party, which relationship was protected under the law, (2) that a "hybrid" test of the economic realities and common law control test should be applied to determine whether plaintiff had a traditional "employment" relationship or whether plaintiff was an independent contractor, (3) that the evidence presented in the trial court failed to meet the standard of the "hybrid" test and, therefore, plaintiff had no standing to

assert a cause of action under 42 U.S.C. §2000e.

B. STATEMENT OF THE EVIDENCE

Plaintiff, Dr. Jacqulyn Diggs, is an adult, Negro female, licensed to practice medicine in the State of Texas and in Tarrant County. Plaintiff specializes in obstetrical and gynecological medicine. Harris Hospital-Methodist, Inc. is a privately owned and operated hospital, which employs in excess of fifteen (15) employees.

In July of 1981, plaintiff was granted the temporary privilege to practice at defendant hospital; and in September of 1981, she was granted the privilege to practice as a "provisional" staff member of the hospital. As a member of the "provisional" staff, plaintiff was allowed to admit patients to the hospital and to treat those patients who required

obstetrical or gynecological care. In order to secure the "provisional" staff membership, plaintiff was required to submit an application, along with the recommendation of three physicians who were privileged to practice at defendant hospital. Defendant hospital also maintained a list of physicians who were privileged at the hospital and who could serve as "sponsors" during the staff member's provisional period. Plaintiff was required to secure the agreement of three such sponsors to qualify for membership on the "provisional" staff.

During the provisional staff period, the physicians' sponsors were to "observe the provisional members operations for a sufficient period of time to become satisfied of his (sic) competence" and in the case of obstetrics, a sponsor was required to "be present

during the first twelve (12) deliveries." In plaintiff's case, the hospital staff and the sponsors were further instructed that there would be a special stipulation that plaintiff's sponsors were to "scrub" with plaintiff in all surgical cases as opposed to merely "observing" her work.

During the provisional staff period, the defendant hospital, according to its Bylaws and Rules, was to have evaluated and reviewed the performance of each physician on its professional staff at the end of each six-month period. Further, each physician sponsor was to evaluate the performance of the physician and make recommendations concerning plaintiff's promotion from provisional to active staff.

In July of 1982, following the first review of plaintiff's cases by the OB-GYN Quality Assurance Committee, the Committee recommended that plaintiff's privileges be

terminated because a sponsor did not "scrub" with her in one of her cases. The minutes of the committee reflect that plaintiff had been told that her sponsors were to "scrub" with her; however, hospital records verify that plaintiff had not been advised of this special requirement.

Plaintiff was not advised of the recommendation to terminate her privileges until the Credentials Committee and the Medical Board had met and concurred in the recommendation. However, in August of 1982, the Medical Board reassessed its decision and decided that plaintiff should be retained on the Provisional Staff. The OB-GYN Quality Assurance Committee was informed of this fact in August of 1982.

Shortly thereafter, the Chairman of the OB-GYN Quality Assurance Committee called a special meeting of the committee to review the care and treatment by

plaintiff to her patients. At the specially called meeting, the committee reviewed the chart of each individual patient treated by plaintiff from July of 1981 to the date of the meeting; the Committee raised questions in three cases reviewed. Based on these questions, the committee again recommended termination of plaintiff's privileges. Again, despite provisional staff rules to the contrary, plaintiff was not advised of the OB-GYN Quality Assurance Committee's recommendation until it had again passed through the Medical Board.

Plaintiff requested a hearing before the Medical Board, and the request was granted. Two of her sponsors appeared in support of her at the hearing. All three cases were discussed by the Board, the sponsors and plaintiff. During the discussion, the Chief of her division, Dr.

Abbott, specifically agreed that the care rendered by her was appropriate in one of the cases questioned. Thereafter, the Medical Board rejected the Quality Assurance Committee's recommendation; but despite the fact that one of her sponsors appearing at the hearing unequivocally recommended promotion to active staff, the Medical Board decided to retain plaintiff on the provisional staff. Further, the Medical Board required plaintiff to secure additional medical education and to continue to have sponsors present during obstetrical cases and to have a sponsor actually scrub in for surgical cases. This decision was made in October of 1982.

When the OB-GYN Quality Assurance Committee was advised of the Medical Board's decision, the committee decided to review each and every one of plaintiff's cases on a quarterly basis. During its

first quarterly review in February of 1983, the committee raised a question about one of plaintiff's cases; and plaintiff responded to the question addressed to her. No further question was communicated to plaintiff.

In July of 1983, another review of plaintiff's individual patient records from February through June of 1983 was conducted. A question was raised about one surgical case; however, the committee expressly found that the care rendered to the other patients treated by plaintiff during that time period was appropriate.

In May of 1983, plaintiff had been notified that the Credentials Committee was going to hold a "six month review" of plaintiff's provisional privileges; however plaintiff received no further information about the review in June, July, or in August of 1983.

On September 1, 1983, plaintiff, along with three other black physicians, filed complaints with the Office of Civil Rights alleging that defendant hospital engaged in discriminatory practices and procedures. In essence, the complaints focused on the fact that no black physicians were participating on committees involved in the peer review process, that black physicians were being more carefully scrutinized than their white counterparts, that the unequal scrutiny and lack of representation had negatively impacted black physicians' ability to obtain and retain medical staff privileges. Plaintiff's complaint was also based on the fact that black physicians were not promoted from provisional to active staff as quickly as their nonminority counterparts, and that black physicians were more closely scrutinized

during the provisional staff period than were nonminority physicians.

After the filing of the complaint, Mr. Reby Carey, a State Legislator from Tarrant County, arranged a meeting between black physicians and representatives of Harris Hospital. The purpose of the meeting was to allow black physicians to voice their complaints about the practices at the hospital. After the complaints were addressed to representatives of the hospital, including the Administrator and Chairman of the Trustees, hospital officials indicated their desire to work with the physicians to resolve any problems that did exist. Furthermore, a few black physicians were added to existing staff committees. In reliance on the statements of the hospital representatives and in view of the appointments to committees, the four

physicians withdrew their complaints against the hospital.

Plaintiff's complaint to the Justice Department was received by the hospital on September 7, 1983. In October of 1983, plaintiff had still received no feedback concerning the review that was to have been conducted shortly after May of 1983. On October 4, 1983, plaintiff submitted a letter requesting promotion to active staff of defendant hospital. At or about the same time, the OB-GYN Quality Assurance Committee set about to review all of the records of patients treated by plaintiff during the period of time that she had been privileged to practice at the hospital. A complete review of individual patients treated by plaintiff had previously been conducted through July of 1983, as follows: (1) review of individual patients treated prior to August of 1982,

(2) February of 1983, review of patients treated between August of 1982 and February of 1983, (3) July of 1983, review of patients treated between February and July of 1983. The record reflects that prior to July of 1983, four of plaintiff's cases had been questioned, and in July of 1983, one additional case was questioned. However, in re-reviewing plaintiff's records in October of 1983, following plaintiff's complaint to the Justice Department in September, the committee raised questions about 16 patient records, only two of which had been treated following the last review in July of 1983. Dr. James Watts, Chairman of the OB-GYN Quality Assurance Committee, testified that OB-GYN Quality Assurance Committee, had periodically reviewed the records of patients treated by plaintiff, that the review had involved examination of each individual chart of the patients, and

that the same criteria should have been applied in the October review that had been previously been applied in all prior reviews. Dr. Watts also testified that the criteria used by the committee were objective, and that all members of the committee understood the criteria and applied them reliably. Finally, Dr. Watts testified that if the same criteria had been applied to the same cases, he would expect the conclusions about the cases to be the same in October as in prior reviews, and he was unable to explain why only five cases had been questioned prior to the review in October of 1983, one of which did not appear in the list of 16 cases questioned in October of 1983, whereas, in October, a total of 16 cases were questioned upon re-review.

Based on the October review, the OB-GYN Quality Assurance Committee

recommended termination of plaintiff's privileges. Plaintiff was afforded an opportunity to respond to the questions raised by the committee, and she did respond and appeared at the meeting of the committee. Nonetheless, the committee continued to recommend termination. Subsequently, plaintiff met with the Credentials Committee which also recommended termination, and plaintiff appeared in a hearing before the Medical Board which recommended termination as well. The Board of Trustees accepted recommendation of the Medical Board, and plaintiff's privileges were terminated effective September, 1984. Plaintiff was not allowed to appear before the Board of Trustees.

At the time of trial, three of the physicians who had filed complaints with the Office of Civil Rights were no longer

practicing at defendant hospital. The privileges of plaintiff had been terminated involuntarily. The privileges of a second physician, Dr. William E. Garrett, a Board Certified General Surgeon who had practiced on the active staff of the hospital for five years prior to the filing of his complaint, had been limited so that (1) he was required to have another physician consultant associated in the treatment of all of his patients who were required to be admitted to the intensive care unit (a common occurrence in surgical cases), and (2) he was not allowed to take any patients who were admitted through the emergency room unless he associated another physician to consult during hospitalization of the patient. In other words, no referrals came to him through the emergency room as had previously been the rule. These restrictions had been imposed

involuntarily. The third physician, Dr. Byrd, a witness before the court, testified that he had voluntarily terminated his relationship with defendant hospital, but only after a hospital committee had recommended that his privileges be limited in a manner similar to the limitations placed on Dr. Garrett. Dr. Byrd had been a member of the active staff of defendant hospital prior to his termination for about ten years.

Following termination of her privileges to practice at defendant hospital, plaintiff was unable to maintain her privilege to practice at other hospitals in Tarrant County. For a brief period, she was privileged to practice at a suburban hospital, but when the hospital closed its obstetrics division, and since that time, plaintiff has not been able to secure privileges at any other hospital.

Therefore, she has been totally unable to treat obstetrical patients; and her ability to practice gynecological surgery has been significantly reduced. Dr. Garrett testified at trial that the same thing had happened to him. As soon as his privileges were limited at Harris Hospital, he lost his privileges at other hospitals based on the Harris action. Dr. Byrd, recognizing that he would lose his privileges at other hospitals in Tarrant County, moved to another Texas city and no longer practiced in Tarrant County at the time of trial.

## REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT PLAINTIFF DOES NOT HAVE STANDING TO ASSERT A TITLE VII ACTION AGAINST DEFENDANT HOSPITAL FOR THE REASON THAT: (1) THE COURT OF APPEALS ERRONEOUSLY LIMITED THE APPLICATION OF TITLE VII TO SITUATIONS INVOLVING A TRADITIONAL AND SPECIFIC "EMPLOYMENT" RELATIONSHIP BETWEEN A PLAINTIFF AND DEFENDANT OR THIRD PARTY ; (2) THE COURT OF APPEALS APPLIED AN OVERLY RESTRICTIVE TEST IN DETERMINING WHETHER OR NOT PLAINTIFF HAS STANDING UNDER TITLE VII; AND (3) THE COURT OF APPEALS ERRED IN APPLYING THE TEST AND IN HOLDING THAT THE

PLAINTIFF FAILED TO PRODUCE EVIDENCE ESTABLISHING STANDING TO ASSERT A CLAIM FOR RELIEF UNDER TITLE VII.

All courts accept the premise that the language of Title VII is broad and should be liberally interpreted. Further, it is universally accepted that Title VII is not only designed to eliminate discrimination in hiring, firing and promotional decisions, but is also intended to eliminate discriminatory practices which impact access to employment opportunities. This application of Title VII is based on 42 U.S.C. §2000e-2 which provides that:

> "(a) It shall be an unlawful employment practice for an employer . . . (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . ." 42 U.S.C. §2000e-2(a)(1), emphasis added).

Early in the legal history of Title VII, courts began to recognize that a Title VII plaintiff need not establish an

existing or potential formal employment relationship with the defendant in order to have standing to sue under Title VII. Instead, it was sufficient for the plaintiff to assert that the defendant significantly affected or controlled the plaintiff's access to employment opportunities in a discriminatory manner. This rule was first enunciated in Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1970). The Sibley Rule has been consistently utilized in order to give Title VII a broad application in keeping with the objectives of Congress. Puntolillo v. New Hampshire Racing Commission, 375 F.Supp. 1089 (D.N.H. - 1974); Pao v. Holy Redeemer Hospital, 547 F.Supp. 484 (E.D. Penn. - 1982); Gomez v. Alexian Brothers Hospital of San Jose, 698 F.2d 1019 (9th Cir. 1983); Doe, Ex Rel v. St. Joseph's Hospital,

788 F.2d 411 (7th Cir. 1986); Pardazi v. Cullman Medical Center, 838 F.2d 1155 (11th Cir. 1988); Zaklama v. Mt. Sinai Medical Center, 842 F.2d 291 (11th Cir. 1988); Mitchell v. Frank R. Howard Memorial Hospital, No. 87-1913, 87-2069 (9th Cir., August 9, 1988, slip opinion).

In the case at bar, the district court held that "in order for Diggs to recover under this Federal Enactment (referring to 42 U.S.C. §2000e, et seq.), she must be an 'employee' of Harris Hospital as defined by 42 U.S.C. §2000(e)(f) or an applicant for employment of Harris Hospital." Based on this ruling, the court held that "Diggs is not an employee of Harris Hospital and, therefore, does not have a cause of action under Title VII." In limiting Title VII's application to "employee" of defendant, and disregarding the broader application of

Title VII, the district court clearly erred.

Without finding the district court's determination erroneous, the circuit court recognized that other courts have held that Title VII might be violated by interfering with a plaintiff's relationship with a third party. However, the circuit court held that the third-party relationship must be one of "employment" in the traditional sense, and that a physician's relationship with his or her patients could never qualify as a third-party relationship sufficient to invoke the protection of Title VII. In the words of the circuit court:

> "Under the above test, Diggs' relationship with her patients is decidedly not one of employment. Her patients did not control the manner and means of her professional treatment. A physician's work involves considerable skill. Further, patients do not furnish the equipment, instruments, supplies, and support staff used in a physician's rendition of

> medical care. Payment is for services rendered, not on-going compensation. Additionally, a physician provides care for numerous patients within a short period of time."

This decision of the Fifth Circuit Court is clearly inopposite to the decisions of other courts. See Doe v. St. Joseph's Hospital of Fort Wayne, cited supra, (Seventh Circuit), and Mitchell v. Frank R. Howard Memorial Hospital, cited supra, (Ninth Circuit).

Title VII was clearly intended to reach "professionals", as well as less-skilled individuals. The relationship between the intended scope of Title VII and the instant case is most clearly shown by the legislative history of the 1972 amendment to Title VII. See 118 Cong. Rec. 1463-64, 1647. An amendment proposed at that time was designed to exclude from Title VII physicians and surgeons employed by public or private hospitals. In the

course of Senate debate over the proposed exclusion, Senator William said:

> "As I stand here leading the debate on this measure, I try to think as a young person who has gone through that long, hard and expensive trail to be the graduate of a medical school, be he man or woman, black or white, or whatever national ancestry. I say that in this Nation, which so badly needs doctors, it would be a terrible crime if, because of ethnic background, sex, or religion, the American people were denied the services of the new doctor.
>
> "That is exactly what this amendment would do. It would take from a doctor the protection that the Constitution gives him and would protect through this law. I think it would be against all this country holds itself up to be, in an area of one of our greatest needs." 118 Cong. Rec. 1647, emphasis added.

In the same debate, Senator Javits stated:

> "One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water, that only the blue collar jobs and ditch digging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life.

> "Yet, this amendment would go back beyond decades of struggle and of injustice and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion -- just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain -- and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them. 118 Cong. Rec. 1463-64, emphasis added.

The proposed exclusion of physicians and surgeons was defeated; and this Court, in addition to all lower courts, has stated that little distinction should exist between professional and non-professional job situations, and that discriminatory practices in professional fields are not immune from attack. Hishon v. King & Spalding, 467 U.S. 69, 81 L. Ed2d 59, 104 S.Ct. 2229 (1984).

The primary reason cited by the Fifth Circuit for holding that a physician similarly situated to Dr. Diggs could not be protected by Title VII was that "her patients did not control the manner and means of her professional treatment. A physician's work involves considerable skill." In essence, the court's holding accomplishes defacto what Congress attempted to eliminate in refusing to enact an amendment to Title VII that would exclude physicians and surgeons from coverage of the act.

In determining that plaintiff did not have standing to assert a Title VII cause of action, both the district court and the circuit court held that plaintiff could not be deemed to be an "employee" of defendant hospital, but rather was an "independent contractor" under the law. This distinction has been made in the case law

interpreting Title VII rather consistently; however, the federal courts have adopted different standards for determining who is deemed an "employee" for the purposes of Title VII. In most cases, courts have interpreted the term "employee" broadly, using the "economic realities" test. See Wheeler v. Hurdman, 825 F.2d 257 (10th Cir. 1987), cert. den., 108 S.Ct. 503 (1987); Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979); Mitchell v. Frank R. Howard Memorial Hospital, cited supra. Even though some individuals have not been deemed "employees" in the common law agency sense, those individuals have been afforded a cause of action under Title VII because Title VII was intended to protect any individual from discrimination affecting job opportunities. See Mitchell, id. at 8-10.

The "economic realities" test was first approved by the Supreme Court in 1947 in an attempt to interpret who was an "employee" for the purposes of the Fair Labor Standards Act and the Social Security Acts. On June 16, 1947, the Supreme Court decided both United States v. Silk, 331 U.S. 704 (1947), and Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947). Both cases turned on whether the "employee" was actually an independent contractor and, therefore, not a proper plaintiff. In Rutherford, the totality of the circumstances were evaluated by the Court of Appeals, and it was concluded that the workers were "employees" based on the "underlying economic realities". Walling v. Rutherford Food Corp., 156 F.2d 513, 516-517 (10th Cir. 1946). In Silk, the Supreme Court again set forth the "economic realities" test in determining that certain

workers were "employees", not independent contractors, in construing social security legislation.

Citing N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944), the Supreme Court stated that a court is not free to determine employer/ employee relationships without regard to the provisions of the legislation sought to be enforced. Silk, 331 U.S. at 713-14. Additionally, other factors were recognized as helpful in determining whether an individual is an "employee" of the employer. These factors included the employer's right to discharge the employee, and the furnishing of tools and a place to work. Silk, 331 U.S. at 715-16 n. 8. In Bartels v. Birmingham, 332 U.S. 126 (1947), the Supreme Court recognized additional factors to be considered in determining whether an individual is an

"employee". These factors included the permancy of the work relationship, the skill required, and the opportunity for the employer to profit from the work of the"employee". Bartels, 331 U.S. at 128.

Basically three tests have been applied by various Federal courts in distinguishing a plaintiff's status as an "employee" versus an "independent contractor" for purposes of deciding standing to assert a claim under Title VII: (1) the "economic realities test" as described above (Lutcher v. Musicians Union Local 47, 633 F.2d 880, 9th Cir.--1980); the "common law agency test" which emphasizes the question of control over not only the result to be accomplished but also the details and means by which the result is accomplished (Smith v. Dutra Trucking Company, 410 F. Supp. 513, N.D.

Cal.--1976); and a "hybrid test" which requires an analysis of both the economic realities and the right of control of the defendant (Hickey v. Arkla Industries, Inc., 699 F.2d 748, 5th Cir.--1983; Mares v. Marsh, 777 F.2d 1066, 5th Cir.--1985). However, regardless of the test applied, most federal courts continue to pay homage to the "economic realities" of the situation as being significant factors in the determination of whether or not an individual is an "employee" for purposes of protection under Title VII. See Wheeler v. Hurdman, cited supra; Lutcher v. Musicians Union Local 47, cited supra; and Mitchell v. Frank R. Howard Memorial Hospital, cited supra.

If the "economic realities" test were properly applied to the totality of the facts in plaintiff's case, the plaintiff would definitely be deemed an "employee" of

Defendant hospital for the purposes of Title VII. Although the plaintiff was not compensated by the hospital, nor did she receive benefits such as retirement or vacation from the hospital, she was totally dependent upon hospital facilities to treat patients, and termination of her staff privileges at the hospital precluded her continuing to treat patients. The hospital furnished the facilities, equipment and support staff necessary for the treatment of her patients. Further, in treating the patients, the plaintiff performed functions that were part of the hospital's daily services and operations. The hospital obviously profited from the efforts of plaintiff in that the hospital received all of its income from patients who were admitted by its privileged medical staff members. The evidence below showed that no physicians were compensated by the hospital

or received benefits, such as retirement or vacation, from the hospital. Nonetheless, it is obvious that the hospital could not have continued in business had not physicians been available to provide medical treatment to the patients hospitalized in defendant's facility. Basically, the vast majority of hospitals have devised a scheme whereby the staff of physicians are paid directly by the respective patients rather than by the hospital; however, the physician staff is selected by the hospital, organized by the hospital board of trustees, appointed by the board, reviewed by the board, and discharged by the board. Indeed, the only difference between a hospital which operates with a "paid" physician staff and a hospital which operates with an "unpaid" physician staff is just that--payment. The "unpaid" staff of defendant hospital

provides all of the administrative services that would be provided by a "paid" staff, treats patients as would a "paid" staff, and confers benefits on the hospital as would a "paid" staff. The undisputed testimony below was that no patient could be admitted to the hospital except by a medical staff member who was "privileged" to practice approving the admission. If a patient presented at the emergency room, the patient was referred by the hospital to a privileged physician and that physician would then authorize admission. Thus, without the unpaid medical staff of defendant hospital, the hospital would have had to "hire" a medical staff or the hospital could not continue to do business because the hospital would not have any patients to whom services would be provided.

Further, the undisputed evidence in this case established the following "indicia" of employment: (1) plaintiff had to make "application" for the privilege to practice at defendant hospital, (2) plaintiff's application had to be supported by three "letters of recommendation", (3) plaintiff had to secure the agreement of three physicians to serve as sponsors, who were charged with the responsibility of "observing", first-hand, the treatment rendered by her to each patient in delivery or surgery, (4) plaintiff's performance was reviewed periodically, (5) initially, each physician was required to serve a "probationary" trial period wherein performance was evaluated on a case-by-case basis, (6) continuation of privileges was dependent on the "evaluation" of plaintiff's performance, (7) paid hospital staff (i.e., nurses, etc.) also monitored

plaintiff's performance and made reports to the Sectional Quality Assurance Committee who evaluated plaintiff's performance, (8) "promotion" was dependent on performance evaluations by a committee and by the sponsors (i.e. "supervisors"), (9) the medical staff could and did impose requirements on a physician for continuation of staff privileges, e.g. plaintiff was required to attend additional medical education courses and Dr. Garrett was required to employ a consulting physician for each patient treated by him in the intensive care unit and for any of "his" patients who were admitted to the hospital through the emergency room, and (10) the hospital furnished the facilities, the equipment, and the staff used by the plaintiff in delivering medical care to the patient. If the paid hospital assisting staff had a question about treatment of a

patient, the hospital staff would and did , contact another physician for advice while treatment was being rendered to a patient by plaintiff. In other words, the sponsor and other physicians not only "observed" and evaluated the treatment by provisional staff members, but they might also be asked by a paid employee of the hospital to intervene during a procedure; thus sponsors did indeed take an active part in providing care to plaintiff's patients and therefore functioned as "consultants and as supervisors" as opposed to a mere "observers."

The district court below based its finding that plaintiff was not an employee of defendant hospital on the fact that: (1) she was a "voluntary" probational staff member; she had a practice outside of the hospital, and only came to the hospital to perform tasks she "cannot" perform at her

office, that she was not required to admit patients to Harris instead of another hospital; and because she was not paid by defendant hospital, nor did she receive benefits from the hospital. It is elementary that all employment is "voluntary" and any employee accepts and continues employment voluntarily, is always free to work for any other employer, and may work part-time and flexible hours; thus, these facts are not determinative or persuasive. While compensation and benefits are factors to be considered, they too are not solely determinative.

The appellate court determined that plaintiff could not be an employee of defendant hospital for purposes of Title VII because the hospital did not direct the manner or means by which plaintiff rendered medical care, that she provided treatment without direct supervision, that a sponsor

was required only to attest to her qualifications, not to direct the details of the exercise of her skill; the hospital did not provide salary or wages to physicians with staff privileges, nor did it pay their licensing fees, professional dues, insurances, taxes, or retirement benefits; plaintiff had the right to practice at other hospitals during the time she was on the staff of defendant hospital; that there was no evidence submitted at trial that her privileges at Harris Hospital were necessary to her practice or that denial of staff privileges at Harris Hospital hampered her ability to obtain staff privileges at any other Fort Worth hospital. Some of these findings are clearly erroneous.

First of all, there was considerable evidence that termination of plaintiff's privileges hampered her ability to obtain

staff privileges at all other Fort Worth hospitals. The same evidence existed for Dr. Garrett. Further, Dr. Byrd testified that this situation existed frequently for physicians who were discharged in Tarrant County. Specifically, Plaintiff testified that at the time of the termination of her privileges she had "courtesy" staff privileges at Huguley hospital, another Tarrant County hospital with an obstetrical unit; that in order to maintain these privileges she had to be on the provisional or active staff of another hospital; that at the time her privileges were terminated at Harris, her privileges also terminated at Huguley; that she applied for provisional or active staff privileges at Huguley, but that her application was denied because she had not had enough admissions at that hospital for an independent evaluation of her performance

there and because of the action of Harris Hospital; that she was able to get privileges at a suburban hospital that had an obstetrical unit but shortly thereafter the obstetrical unit had been closed; that she had applied to several other hospitals with obstetrical units in Tarrant County and that her application had been denied at each because of the action of Harris; and that she was totally unable to practice her obstetrical specialty although she had been privileged at two small suburban hospitals as a gynecologist. (Statement of Facts, pp.101-104). Dr. Garrett also testified that as soon as his privileges were limited at Harris, the other Tarrant County hospitals followed suit by limiting his privileges based on the Harris action. This evidence was totally undisputed by the defendant and was supported by documents introduced by the defendant. Thus, the

circuit court's finding that denial of staff privileges had not "hampered her ability to obtain staff privileges at any other Fort Worth hospital" is clearly erroneous.

The Circuit Court also erroneously found that "Diggs treated her patients in Harris Hospital without direct supervision" and that "as a provisional staff member she was required to have a sponsor present during surgical procedures, but the purpose of that requirement was to have someone to attest to her essential qualifications, not to direct the details of the exercise of her skill"; therefore, "the hospital does not direct the manner or means by which Diggs renders medical care." The medical staff by-laws did state that the sponsor was supposed to observe enough cases to be able to attest to the competency of the physician and ordinarily "observation" was

the only thing required of a sponsor. However, in plaintiff's case, from the very beginning her "sponsors" were instructed to "scrub in" with her. The quality assurance committee's minutes indicate that she was first criticized and proposed to be terminated because she did not have a "sponsor scrub" in with her. When the Medical Board decided to retain plaintiff on the provisional staff, she was instructed by the Chief of Staff that she was to continue to have her sponsors attend in each surgical case and delivery and she was to "seek consultation" with them in problem situations. Other records of two patients treated by plaintiff exemplify that the sponsors took a more active than passive role in working with plaintiff. On one occasion (Chart No. 645-058), one of the nursing staff of the hospital called plaintiff's sponsor and requested

consultation before plaintiff arrived at the hospital. In response to this request the sponsor, who was at the hospital, examined and administered treatment to the patient before plaintiff arrived at the hospital. On another occasion, prior to deciding to perform a C-section, both plaintiff and her sponsor unsuccessfully attempted a low forceps delivery. Further, as noted previously, the hospital instructed Dr. Garrett that he would have to retain another surgeon to consult on his cases before he could render medical care to his patients; otherwise his privileges would be terminated. Dr. Byrd testified in at least one instance that even when he was on medical staff the hospital exercised control over the manner in which he treated his patients. He recounted an incident with a patient who had bilateral pneumonia, and was twenty-six weeks pregnant upon

admission. A member of the hospital advised the patient that she would be discharged at a certain time; this decision was made and conveyed to the patient without ever consulting Dr. Byrd. In other words, again the hospital intervened in the course of the medical care of a patient and exercised direct control over the details of the care. In summary, despite the fact that the medical staff bylaws provide for what appears to be passive observation and evaluation of medical care, the practice of the hospital and its medical staff was to intervene and actively participate in the day to day care and treatment of another physician's patients. In fact, Dr. Digg's sponsors were asked to do so and she was instructed to use them in this manner. Again, the finding that the hospital did not control the manner of her work is erroneous. Further, it is undisputed that

the hospital controlled the "means" by which she rendered care since it owned the facility and equipment and it furnished the support staff for rendering care while the patient was in the hospital.

The Circuit Court did not address the merits of plaintiff's claim but solely addressed the standing of plaintiff to assert a cause of action for relief under Title VII. As noted in the excerpts from Senate debate in 1972, the right of a female and minority physician to assert a claim for relief under Title VII is a most valuable right. There is a clear conflict between Circuit Courts on this issue. (The conflict is most apparent when comparing the opinion of the Seventh Circuit in Doe with the opinion of the Fifth Circuit in the instant case.) Hospitals have adopted the "privilege" system primarily to avoid liability for tort under

common law agency principles. They are attempting to use the same "loophole" to avoid liability for discriminatory practices which destroy the ability of physicians who should be protected from such destruction by a broad and proper application of Title VII. The economic realities of the relationship between physicians and hospitals compels the reversal of the decision of the Fifth Circuit below.

## CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari be granted.

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## CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for Writ of Certiorari have this 19th day of September, 1988, been forwarded to all counsel of record.

John B. McNamara, Jr.